No. 14077

United States
COURT OF APPEALS
for the Ninth Circuit

INTERSTATE COMMERCE COMMISSION et al.,
Appellants,

v.

THE MARTIN BROTHERS BOX COMPANY,
a corporation,
Appellee.

PETITION FOR REHEARING BY THE MARTIN BROTHERS BOX COMPANY, APPELLEE

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PETITION FOR REHEARING

Believing that pride of opinion should not preclude correction of error, we will again give careful consideration to this case, thus following the admonition of an ancient law giver: "If today thou seest fit to judge differently from yesterday, do not hesitate to follow the truth as thou seest it; for truth is eternal, and it is better to return to the truth than to persist in the false." Statement by the late Justice H. Harry Belt in Judson v. Bee Hive Auto Service Co., 136 Or. at p. 6.

To the HONORABLE WILLIAM HEALY, WALTER L. POPE and RICHARD CHAMBERS, Circuit Judges:

Being of the firm belief after a painstaking examination of the three opinions rendered in this case that the majority misunderstood the decision rendered by the Interstate Commerce Commission, we are respectfully petitioning for a rehearing, and we urge the following considerations upon the Court:

As we read the opinion of Judge Healy, we conclude that he thought the Commission determined that the difference in the treatment accorded to The Martin Brothers by the Southern Pacific in supplying cars and that accorded to other shippers was, while discriminatory, a reasonable discrimination. He thought that since Congress has not defined discrimination and has prohibited only unreasonable discrimination it is within the exclusive province of the Commission to determine that a difference in treatment, or in effect a discrimination, is reasonable rather than a violation of the statute.

We do not agree with this legal proposition, but we do emphatically urge that there is no basis for such a proposition in the determination made by the Commission.

The position of the Southern Pacific throughout the entire proceedings, from the hearing before the examiner to the reply brief and argument in this Court, has consistently and vehemently been that no discrimination against the complainant was practiced—of any character, or to any extent whatever. The case was fought out before the examiner, and before the Commission and before the trial court and before this Court upon the factual issue of the reasonableness *of the requests of the shipper,* Martin, for transportation. The defense of the carrier was that *all* requests for transportation during the period in question, made by Martin by actual orders for cars, had been completely fulfilled. The phrases "car orders" and "written orders" jangle through and across nearly every page of the pleadings and the

briefs of the railroad. In the railroad's reply brief in this Court appears (p. 15) the following: "the record contains substantial evidence that Martin Brothers, *as a matter of fact,* made no *'reasonable' requests* for the furnishing of *more cars than it actually received* during the nine-month complaint period." (Emphasis supplied)

The Commission itself determined this factual question against the contention of the railroad.

To make this clear, we summarize, at the risk of being tedious, the findings of the Commission on this question:

1. Martin's president discussed car requirements with officers of Southern Pacific and was given assurances that cars could be obtained (Commission Report, R. 110).

2. By letters in 1946 Martin informed Southern Pacific that its immediate minimum requirements were 36 cars per week, or 150 cars per month (Commission Report, R. 111).

3. During the complaint period Martin's "officers and other personnel complained to the defendant that adequate cars were not being received and that additional cars were urgently needed" (Commission Report, R. 111).

4. Martin's salesmen came to Oakland, where the Martin plant was located, to aid in the attempt to obtain more cars from defendant (Commission Report, R. 111).

5. A salesman of Martin spent three months during the complaint period "during which time he exerted all his efforts to obtaining more cars" (Commission Report, R. 111-2).

6. On several occasions this employee induced Southern Pacific employees to reconsider and assign a car for Martin's plant (Commission Report, R. 112).

7. This employee of Martin called upon Southern Pacific's Division Agent at Medford and also upon Southern Pacific's Freight Traffic Manager at Portland in his effort to get cars (Commission Report, R. 112).

8. Martin's employees visited the station office of the railroad at Oakland both in the forenoon and in the afternoon of each day to get cars, and while there "often called the defendant's office at Eugene with respect to the assignment of cars for the complainant" (Commission Report, R. 113).

9. Although more cars were furnished than requested by "written orders", nevertheless "complainant desired, required and attempted to secure additional cars from defendant" (Commission Report, R. 125).

10. "Defendant insists that inasmuch as the complainant received more cars than were specifically ordered, it has no legitimate reason to complain that the distribution of cars made was other than reasonable", but "the written car order blanks, which were filled out and given to the defendant's agent after the complainant knew what cars had been assigned to it for the particular day, were to a large extent *nothing more than a written confirmation, for the defendant's records, that the*

complainant wanted the cars that had been assigned to it for that day" (Commission Report, R. 119-20; Emphasis supplied).

Thus, from the actual findings of the Commission, as set forth in the report of the Commission, the issue which was tendered by Southern Pacific as a defense, to the effect that all cars reasonably requested had been furnished, was decided squarely against the railroad.

That this was the issue, and that no issue of any difference in the treatment accorded to Martin than that accorded to other shippers, upon which a decision might be made that such difference was "reasonable", was presented to or considered by the Commission becomes more abundantly clear when the exceptions of the railroad to the report of the Examiner are considered. The 12 exceptions taken by the railroad to the report of the Examiner are set forth in the appendix to this petition in summary form. They are set forth in full in the amended petition before the District Court (R. 10-18). From these exceptions it appears that the whole issue presented to the Commission (other than objections to historical statements and the like) was the factual issue of whether the railroad accorded as favorable treatment to Martin as to other shippers. The contention that Martin was actually oversupplied with cars was repeated and repeated. The only legal contention that the railroad urged was that it was incumbent upon Martin to show that its competitors in the wire-bound box manufacturing business received more favorable treatment from the railroad than did Martin, and

that in the absence of such showing of a competitive relationship there could be no recovery of reparations.

Of the fact that there was a flagrant discrimination practiced against Martin during (and prior) to the complaint period, there is no doubt whatever, either on the evidence, or the findings actually made by the Commission. The determination by the Commission, that the car order blanks were neither conclusive nor persuasive evidence of the requests of Martin for cars, and that reasonable requests had been made other than by means of these blanks, destroyed forever the claim of non-discrimination. The Commission found that Martin was furnished 593 cars during the complaint period, "or an average of about three cars per working day." The Commission further found that Martin needed, and attempted to secure, cars in sufficient numbers to keep the Oakland plant operating at capacity during the entire complaint period and that with two shifts operating the car requirements were thirteen cars each day.

The Commission further found that while Martin required never less than 6 cars per day and from that up to 13 cars per day, and received about 3 cars per day, or from 25 to 50 percent of its requirements, other shippers received from 80 percent to 100 percent of their requirements, and those at points where the railroad had competition with other carriers received 100 percent of their requirements.

The apparent reason, and the only possible reason, for the decision which the Commission made, in the face of the findings which the Commission made, lies in

the contention presented by the railroad as to the necessity for a showing of a competitive relationship between the complaining shipper and more favored shippers. The railroad argued before the Commission (Exceptions p. 49): "The record in this case fails to show any competitive relationship between complainant, a manufacturer of wirebound boxes, and the other parties which complainant has alleged received more favorable treatment . . . there was no showing that complainant was in competition with the shippers at the points where Mr. Forrest found, as he stated, 'no evidence of shortage'. Because there was an issue as to the violation of Section 3, in respect of which the complainant did not sustain its affirmative burden of proof, the Examiner committed error in not finding for the defendant on this issue."

The Commission found and concluded: "The defendant points out that the complainant has not shown that it is in competition with any shipper. . . . The complainant has not established that any of its competitors was unduly preferred by the practices of the defendant here assailed."

Throughout the report there is no finding or conclusion that the discrimination practiced against Martin during this time was in any degree whatever a reasonable discrimination. The sole justification for the discrimination according to the Commission was lack of competition.

The opinion of Judge Healy seems to be that the decision of the Commission was a determination that

the discriminatory practices of the railroad were reasonable. He would not otherwise be justified, having just previously in his opinion stated that "factual determinations [are] confided by Congress to the judgment and discretion of the Commission", in calling attention to "substantial testimony in the record" in subjoined notes.

But it is the railroad that is asking this Court again to try out the facts. Martin has insisted throughout that every essential fact in the record found by the Commission coincided in every respect with the finding of the Examiner. The Commission (as Judge Healy says) did not distort the record. The Commission did find to be without any basis or significance the "substantial testimony" referred to in the subjoined note. In fact, Judge Solomon determined that except for the "Conclusions" of the Commission, "the findings of the Examiner were practically identical to those of the Commission", and the Southern Pacific claims that this was an error upon the basis of which this Court should reverse Judge Solomon (Statement of Points on Appeal, R. 686). Judge Healy determined that the Commission in its report did not in any way distort the record before the Examiner, and Judge Solomon determined that the findings of the Commission and those of the Examiner were practically identical. If this was an error of Judge Solomon it must be an error of Judge Healy. If not, neither was in error and Judge Solomon should not be reversed.

The error of the Commission was in failing to find that the discrimination practiced against Martin was

"unreasonable", or at least in failing to make a finding that it was either reasonable or unreasonable, and in finding *per contra* that reparations, where discrimination is in fact found to exist, may be recovered only by a showing of a competitive relationship between the one discriminated against and those unduly favored.

Appeals to this Court are supposedly tried and disposed of upon the errors specified, not upon other grounds.

The errors specified by both appellants are in the record at pages 686 to 694.

It is interesting to note that while Judge Healy found no distortion of the record made before the Examiner as a reason for affirming the Commission, the Southern Pacific (R. 686) specifies as the first error of the District Court a finding that the findings of the Examiner were practically identical with those of the Commission.

Following this no less than twelve points upon which the railroad would rely on the appeal have to do solely with the reasonable requests of Martin for transportation—a matter which the Commission found against the railroad upon exceptions from the same findings by the Examiner, as we have shown above.

Point XIII (R. 691) says the *trial court erred* in finding and concluding that "Nothing in the Act and no decision that I have been able to find permits discrimination as between shippers merely because they are not in the same type of business and therefore do not compete against each other." In other words the rail-

road asks this Court to reverse the trial court for refusing to legalize discrimination among non-competing shippers.

The remaining points upon which Southern Pacific relies on this appeal, and, as near as we can determine from reading them, the points upon which the Commission relies, are upon the sufficiency of the proof of damages, or are of the shot-gun or boiler plate variety, pointing out no specific error of the trial judge but declaiming generally that the decision, being against the appellants, was wrong.

The one real issue raised by the railroad before the Examiner, and repeated before the Commission, and raised and repeated again before the trial court, and repeated again before this Court, was the issue of fact of whether the railroad actually supplied the complainant with all of the cars which the complainant requested and had any need for. The Commission as trier of the facts, on substantial evidence, resolved this issue against the railroad.

Upon review the trial court sustained the Commission upon these findings of fact, but reversed the Commission upon its conclusion that a competitive relationship must be shown to recover reparations and its conclusion that the proof of damages was not sufficient, and remanded the matter to the Commission for further proceedings.

The basis of the opinion of a majority of this Court seems to be that the decision by the Commission, erroneous as it may be, is conclusive upon the courts, and may not be reviewed.

We do not think that this doctrine of administrative finality renders this Court, or rendered the trial court, helpless to correct obvious and judicially ascertained error. The scope of judicial review may be narrow, but courts are not as impotent as the majority opinion would make them.

I.C.C. v. Union Pacific, 222 U.S. 541, referred to by Judge Healy, decides not so much that Commission orders are not to be set aside if within the Commission's statutory power and supported by substantial evidence, but decides rather that a Commission order *must* be set aside by the courts if found to be "based upon a mistake of law," or if the Commission's authority "has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

The Administrative Procedure Act of 1946 (5 U.S. C.A. § 1001 to § 1011) requires that the reviewing court "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or application of any agency action" (5 U.S. C.A. § 1009).

Under this section reviewing courts are required to "set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;"

Furthermore, this Act provides (5 U.S.C.A. § 1007) that in cases in which agencies (here the Commission) have not presided at the reception of evidence, the

officer who presided shall initially decide the case, and prior to decision upon agency review of the decision of the officer (in this case the Examiner) the parties shall be afforded opportunity to submit exceptions and supporting reasons for such exceptions, and the record shall show the ruling upon each such exception presented.

The Commission report commences with the statement that exceptions not discussed in the report nor reflected in the findings or conclusions have been given consideration and found not justified. The action taken or disposition made upon the twelve exceptions to the report of the Examiner is shown in the appendix under each exception in summary form.

Consideration of this statutory provision and of the exceptions to the report of the Examiner taken by Southern Pacific and the disposition made by the Commission of these exceptions again make abundantly clear (1) that the Commission did not consider or decide upon the reasonableness or unreasonableness of the discrimination practiced by the Southern Pacific, and (2) that the Commission decided this case in an arbitrary and capricious manner and in a manner contrary to law, in that the basis for the decision was the failure of the complainant to show that competitors of the complainant received the more favorable treatment, and that there was no sufficient proof of damage any way.

For many years the railroads were in the favored position, most aptly described as "Heads I win—tails you lose." If a shipper filed a complaint with the Commission and the Commission determined that he had

been damaged by reason of discrimination or other unlawful practice on the part of the railroad, then the railroad could sit back and ignore the order of the Commission. If the shipper proceeded in court he had only a prima facie case against the railroad and was in effect compelled to try his case all over again.

If, on the other hand, after a hearing before the Commission there was a determination, no matter how erroneous or contrary to the law, that the shipper was not entitled to damages, he was entirely without any remedy under the now happily discarded "negative order" doctrine.

The Supreme Court of the United States in United States v. I.C.C., 337 U.S. 426, 69 Sup. Ct. 1410, 93 L. Ed. 1451, threw this negative order doctrine in the ash can, where it properly belonged. At the same time the specious doctrine of "administrative finality" was cut down to size. As to the review to be afforded shippers who have been unjustly denied reparations by the Commission, the court had this to say:

> "The contention of the Commission and the railroads as to § 9 is this. A shipper has an alternative. He may bring his action before the Commission or before the courts. But he must make an election. If he elects to 'bring suit' in a court and is unsuccessful, he retains the customary right of appellate review. If he elects to 'make complaint to' the Commission, as the Government did, and relief is denied, he is said to be barred by the statutory language of § 9 from seeking any judicial review of the Commission order. Under the contention the order is final and not reviewable by any court even though entered arbitrarily, without substantial supporting evidence, and in defiance of law.

"Such a sweeping contention for administrative finality is out of harmony with the general legislative pattern of administrative and judicial relationships. See, e.g., Shields v. Utah-Idaho Cent. R. Co., 305 U.S. 177, 181-185, 59 S. Ct. 160, 162-164, 83 L. Ed. 111; Stark v. Wickard, 321 U.S. 288, 307-310, 64 S. Ct. 559, 569-571, 88 L. Ed. 733. And this Court has consistently held Commission orders reviewable upon charges that the Commission had exceeded its lawful powers. See, e.g., Interstate Commerce Commission v. Louisville & N. R. Co., 227 U.S. 88, 91-93, 33 S. Ct. 185, 186-187, 57 L. Ed. 431; Chicago Junction Case, 264 U.S. 258, 266, 44 S. Ct. 317, 320, 68 L. Ed. 667. . . .

"While the Government here does not seek enforcement of a Commission order for the payment of money, the root of the controversy concerns the payment of money damages under 49 U.S.C. §§ 8, 9, 49 U.S.C.A. §§ 8, 9. Had the Commission made an award to the Government it could have filed a civil suit to recover money damages under the provisions of 49 U.S.C. § 16 (2), 49 U.S.C.A. § 16 (2). That section provides that such a suit 'shall proceed in all respects like other civil suits for damages * * *'—that is, before one district judge. And an appeal from a judgment in such a case goes to the Court of Appeals. The same one-judge trial and *appeal procedure available for enforcement of and award order would appear to be an equally appropriate and adequate tribunal for adjudication of validity of a Commission order denying reparations.* For actions to enforce Commission orders awarding reparation, and actions to challenge Commission orders denying reparations, basically involve the same parties, the same disputes, the same claims for money damages, and the same statutes." (Emphasis supplied)

In further proceedings in this case of U. S. v. I.C.C., after the remand to the district court, the matter was

submitted on the record before the Commission. District Judge Morris decided that, while judicial review should "unhesitatingly demand fair treatment of the parties at interest and prevent any action which is arbitrary or not in accordance with law", the decision of the Commission was founded on ample evidence and was in accord with law (92 F. Supp. 1002).

This decision of Judge Morris was reversed by the Court of Appeals, 198 F. 2d 958. The majority opinion in this decision correctly states the true rule as to the nature of judicial review. The case was decided on its merits, with the entire record considered and weighed. The court proceeded to "examine the legal and factual basis for each of these conclusions' of the Commission (198 F. 2d at 965). The court said that while the Commission's views as to questions of law arising in the course of its duties are entitled to weight, nevertheless "there are occasions even in this field where the courts are required to apply 'the fixed law to the established fact' " (198 F. 2d at 968).

The Supreme Court of the United States refused to grant certiorari, 344 U.S. 893, 97 L. Ed. 691, 73 S. Ct. 212. The Supreme Court had previously said in this same case that the Commission cannot decide a matter "in defiance of standards established by Congress to determine when reparations are due." 337 U.S. 435, 69 S. Ct. 1415.

Here is the heart of the error in the opinion of Judge Healy, in which Judge Chambers dubiously concurs:

The doctrine of administrative finality extends only to findings of fact based upon substantial evidence. Conclusions, whether designated as ultimate findings or conclusions of law, are not a finality conclusive on the courts.

Here the Commission found as a fact that Martin received substantially less than half of the cars requested and required while other shippers received generally 100 percent of their requirements. These were findings of fact which, under the doctrine of administrative finality, the courts should not disturb. But it is for the courts to say whether the conclusions or ultimate findings on these facts are proper or are improper conclusions. Suppose the railroad had refused service entirely to Martin while supplying other shippers in full and the Commission had so found but had concluded that Martin was not entitled to reparations, would this conclusion be binding upon the courts? Judge Healy's opinion necessarily answers this is the affirmative. But this supposition makes it apparent that the conclusions of the Commission were simply conclusions of law which are not protected in any sense by the doctrine of administrative finality.

Judge Chambers found, as did the Examiner and as did Judge Solomon and as did Judge Pope, "an unfair discrimination by Southern Pacific Company".

The Commission never determined whether the discrimination which the Commission found to have been practiced by Southern Pacific Company was a reasonable discrimination, or whether it was an unlawful discrimination. The Commission did not find that "there

was no undue discrimination under the circumstances of the case", but found rather that the discrimination was between a lone light-load shipper on the one hand and shippers with heavy pay-bottom loads not competing in the wire bound box business on the other hand.

But as we have shown the Supreme Court of the United States has held categorically that the Interstate Commerce Act and all amendments to it have aimed at wiping out discrimination of all types (U. S. v. B. & O. R. Co., 333 U.S. 169) and neither the Commission nor the courts are at liberty to act in defiance of this standard established by Congress (U. S. v. I.C.C., 337 U.S. 435).

It is respectfully submitted that this cause should be remanded to the Commission for further proceedings.

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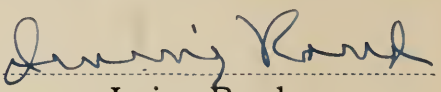
In accordance with Rule 23 of this Court, Appellee suggests that should a majority of the Judges having heard this matter grant a rehearing, the case be heard en banc.

I hereby certify that in my judgment the foregoing petition for rehearing is well founded and is not interposed for delay.



Irving Rand
Of Attorneys for Petitioner.

Summary of Individual Exceptions of Defendant Railroad to Examiner's Proposed Report And the Action of the Commission Thereon

The exceptions of the railroad to the Examiner's report are set forth in the amended petition in the District Court (R. 10-18) and in summary form are as follows:

1. Exception to the historical statements, and Martin's conversations with the railroad's representatives, as irrelevant and immaterial, the action being "predicated upon a statutory obligation and not upon any alleged contractual relation."

> The Commission failed to sustain the railroad on this exception and adopted the report of the Examiner in toto.

2. Exception to Martin's complaints that adequate cars were not being received and that additional cars were urgently needed as these "do not constitute specific car orders and do not constitute a reasonable request for specific cars, as provided by Section 1 (4) of the Act."

> The Commission failed to sustain the railroad on this exception and adopted the statement of the Examiner verbatim.

3. Exception to the finding of the Examiner concerning Martin's inability to fill orders for Martin's customers for lack of transportation as "irrelevant and immaterial."

> The Commission failed to sustain the railroad on this exception and adopted the finding of the Examiner verbatim.

4. Exception to the finding that Martin would ascertain from Eugene how many cars were assigned to it and then place an order for these cars as "unsupported by the evidence" and as not modifying, amending or adding to "the specific orders which were actually placed."

The Commission failed to sustain this exception and adopted this finding of the Examiner in toto.

5. Exception to the finding that the carrier knew the shipper wanted more cars than were listed on the order blanks as an erroneous conclusion of the Examiner because the railroad's duty to supply cars was measured by the shipper's knowledge that "complainant was refraining from ordering all the cars it could use would not constitute a waiver of the requirement for specific car orders."

The Commission failed to sustain the railroad on this exception and adopted this finding of the Examiner in toto.

6. Exception to the statement that the few cars held for several days may have been cars restricted for loading to particular destination areas as overlooking "the significance of complainant holding cars on hand for several days as pertinent to its claim for damages," and as not of "appropriate definiteness."

The Commission failed to sustain the railroad on this exception and adopted this finding of the Examiner in toto.

7. Exception to the finding that Martin did not receive its fair share of the cars available as "not supported by the record but are contrary thereto and are based upon a misapplication of the law. Our reasons are more fully developed in the subjoined argument."

> The subjoined argument is found at pages 13 to 43 of the "Exceptions of Defendant to Proposed Report and Request for Oral Argument", introduced as part of the record in this case. It will be referred to hereafter as the "Carrier's Exceptions". This argument concerns exceptions 2, 4, 5, 7, 11 and 12 considered together and is devoted entirely to the "specific written order" or "specific car order" theme, and concludes, "because the complainant cannot recover for the non-furnishing of cars which it did not order, the Commission should sustain defendant's exceptions numbered 2, 4, 5, 7, 11 and 12." The issue before the Commission on this exception was confined to the factual situation of whether in fact the carrier furnished the shipper the cars for which the shipper made reasonable request, the contention of the carrier being that the carrier actually oversupplied the shipper, furnishing more cars than the shipper could use or for which the shipper made reasonable request. The Commission on this issue of fact failed to sustain the railroad and adopted the report of the Examiner in toto.

8. Exception to the "entire discussion of the question of damages" as "unnecessary."

The Commission did not sustain the railroad on this exception as to the discussion of damages being "unnecessary," but did conclude (erroneously in the opinion of District Judge Solomon and in the opinion of Circuit Judge Chambers and of Circuit Judge Pope) that the evidence fell short of the requirement to support an award of reparations, as "the proof thereof must be as definite and certain as would be necessary under established principles of law to support a judgment in court."

9. Exception to any discussion or conclusions concerning damages, the Examiner's award of damages being made "upon erroneous allocation of cars to complainant contrary to its specific car orders and without any reasonable request therefor to defendant."

The Commission failed to sustain the railroad on this exception on the question of the allocation of cars to complainant. On other grounds, not for any reason stated in the exceptions, the Commission concluded that reparations should be denied.

10. Exception to the failure of the Examiner to conclude that the carrier established and enforced an equitable rule of car disposition.

The Commission failed to sustain the railroad on this exception and adopted the report of the Examiner in this respect in toto.

11. Exception to the proposed ultimate general findings and conclusions of the Examiner as objectionable on the grounds expressed in the preceding exceptions.

The Commission did sustain the railroad in regard to the conclusion that there should be no reparations awarded, but not on any of the grounds urged in the arguments of the railroad.

12. Exception to the failure of the Examiner to find that the complainant was supplied with all of the cars to which it was legally and equitably entitled.

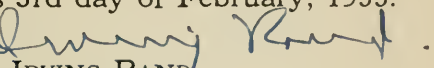
In the argument of this exception (Carrier's Exceptions p. 49) the carried argued to the Commission: "The record in this case fails to show any competitive relationship between complainant, a manufacturer of wirebound boxes, and the other parties which complainant has alleged received more favorable treatment. The only specific parties concerning whose car supply complainant presented evidence were Timber Structures, Inc., and the six concerns listed in Exhibits Nos. 2 to 7, but nothing was shown as to their competitive relationship with complainant."

Inasmuch as the railroad in this argument (Carrier's Exceptions p. 47) definitely stated that the evidence showed that the railroad "applied the distribution rule *equally* to all lumber shippers on the Portland Division, including Martin Brothers Box Company", and the Commission found to the contrary the controlling reason for sustaining this exception, as the Commission did, was on the basis of the non-competitive relationship between Martin and the other shippers. Otherwise stated, the Commission decided against the carrier on this exception as to the fact of discrimination, but

adopted the legal contention submitted by the carrier. This is demonstrated by the finding of the Commission (R. 125): "The complainant has not established that any of its competitors was unduly preferred by the practices of the defendant here assailed."

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Petition for Rehearing upon counsel for the Appellants by mailing, by first class mail, three copies thereof addressed to James C. Dezendorf and George B. Campbell, 800 Pacific Building, Portland, Oregon, and one copy thereof addressed to James E. Lyons and Charles W. Burkett, Jr., 65 Market Street, San Francisco, California, and three copies thereof addressed to Edward M. Reidy, Interstate Commerce Building, Washington, D. C., and one copy thereof addressed to William L. Harrison, Flood Building, San Francisco, California. Dated at Portland, Oregon, this 3rd day of February, 1955.



IRVING RAND,
Of Attorneys for Appellee.